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742-482—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 236

JOSEPH K. TAUSSIG, JR., PETITIONER

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court denying petitioner's application for a three-judge court (J.A. 28)[1] is reported at 219 F. Supp. 757. The order of the district court granting summary judgment in favor of respondents (J.A. 46) is not reported. The judgment order of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1964. The petition for a writ of certiorari

[1] "J.A." references are to the Joint Appendix submitted in the court of appeals and filed here pursuant to Rule 21 of this Court.

was filed on July 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 281 prohibits a retired officer of the Armed Services from representing any person for compensation in the sale of anything to the government through the department in whose service he holds a retired status.

2. Whether 18 U.S.C. 281 constitutionally applies to regular but not to reserve retired officers.

3. Whether petitioner has unconstitutionally been compelled to incriminate himself by Department of Defense Directive 5500.7, requiring retired regular officers of the Armed Forces to disclose their employment duties and to declare that they do not involve selling to the Government in violation of law.

STATUTE INVOLVED

18 U.S.C. 281 provides:

> *Compensation to Members of Congress, officers, and others in matters affecting the Government*
>
> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirect-

ly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person especially excepted by Act of Congress.[2]

STATEMENT

This action seeks to challenge a Directive of the Department of Defense stating that Section 281 of the Criminal Code (18 U.S.C. 281) places restrictions upon the conduct of retired regular military officers seeking to deal with the United States. The first paragraph of Section 281, enacted in 1864 (Act of June 11, 1864, 13 Stat. 123), generally prohibits an "officer" of the United States from receiving compensation for dealing with the United States. Criminal penalties are imposed. The second paragraph of Sec-

[2] By Section 2 of Pub. L. 87-849, October 23, 1962, 76 Stat. 1126, Section 281 was repealed "except as [it] may apply to retired officers of the armed forces of the United States" and replaced by 18 U.S.C. 203.

tion 281 was added in 1940 (Act of October 8, 1940, 54 Stat. 1021). Its first sentence excepts from "the provisions of this section" "[r]etired officers of the Army, Navy, Marine Corps, and Coast Guard of the United States, while not on active duty." Its second sentence provides that "nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status." In 1962, Section 281 was supplanted by other legislation "except as [it] may apply to retired officers of the armed forces of the United States." Act of Oct. 23, 1962, § 2, 76 Stat. 1126. The Department of Defense Directive involved in this case, Number 5500.7 (May 17, 1963), interprets Section 281, as it now stands, to prohibit a regular retired officer "from receiving or agreeing to receive any compensation for representing any person in the sale of anything to the Government through the department in whose service he holds a retired status."

Petitioner is a retired Captain of the regular Navy. Following his retirement, he was employed as a government representative by defense contractors (J.A. 39–40). In 1962, he became president of "Taussig Associates Government and Industry Consultants and Representatives" (J.A. 25), "representing firms, corporations, and companies which sell material and supplies to the Departments of the Armed Services" including the Navy Department (J.A. 43–44). On Department of Defense Form 1357,[3] filed on August

[3] Pursuant to Department of Defense Directive 5500.7, Form 1357 (Statement of Employment) must be filed by each regular retired officer with the Military Department in which he holds a retired status.

16, 1962, petitioner informed the Navy Department that his duties consisted of (J.A. 26):

> Currently: Attempting to find clients who might profit from utilizing my knowledge of government, industry, marketing analysis skills, legal training, writing ability, technical abilities, operational know-how, and organizational know-how.
>
> Future: Contracting for personal services in the above premise as a consultant on an ad hoc basis, or a Representative on a term contract basis.

On January 10, 1963, petitioner filed this action for a declaratory judgment in the District Court for the District of Columbia. Petitioner sought to have 18 U.S.C. 281, and Department of Defense Directive 5500.7 declared "a nullity" (J.A. 11). Subsequently, he moved that a three-judge court be convened to consider the several constitutional questions which he had also asserted.[4] The application was denied on June 7, 1963, by the district court which, in a detailed opinion, examined and rejected each of petitioner's constitutional attacks (J.A. 28). Thereafter, petitioner confined his attack to the allegedly erroneous interpretation of 18 U.S.C. 281 by the Department of Defense. On July 15, 1963, petitioner's motion for summary

[4] In particular, petitioner alleged that 18 U.S.C. 281 is unconstitutional on account of vagueness or for failing explicitly to require *mens rea* and that both 18 U.S.C. 281 and 10 U.S.C. 802(4) unconstitutionally distinguish between regular retired officers and reserve retired officers. The latter provision subjects "[r]etired members of a regular component of the armed forces who are entitled to pay" to the Uniform Code of Military Justice, 10 U.S.C. 801, *et seq.*

judgment was denied and that of respondents was granted (J.A. 46). The Court of Appeals affirmed, *per curiam*, in a judgment order (Pet. App. 1a).

ARGUMENT

None of the attacks which petitioner makes upon the Department of Defense Directive is substantial. In addition, there is considerable doubt whether petitioner's suit at this time presents a case or controversy properly subject to judicial consideration. There is therefore no occasion for further review.

Petitioner attacks the Department of Defense Directive in this Court on three grounds: (1) that the Directive classifies as prohibited conduct which is not prohibited by Section 281; (2) that Section 281 cannot be applied to regular retired officers but not to reserve retired officers; (3) that the portion of the Directive requiring retired regular officers to file statements describing their duties and declaring that they do not involve selling to the government in violation of Section 281 violates the Fifth Amendment

1. Petitioner argues (Pet. 10–12) that the second sentence of the second paragraph of Section 281, which provides that "[n]othing herein shall be construed to allow" certain sales activities by retired officers, does not constitute a prohibition upon conduct, but is merely a savings clause intended to preserve the effectiveness of two separate provisions of the United States Code which deprive retired officers of pay while selling supplies or war materials to their departments. (37 U.S.C. 801 (b) and (c).) This interpretation is plainly incorrect. The proviso relied upon by petitioner "obviously" means that a re-

tired regular officer will "violate the section if he is 'representing' someone else in the 'sale' of anything to the United States 'through' his former department." *United States* v. *Gillilan*, 288 F. 2d 796, 797 (C.A. 2) (L. Hand, J.), certiorari denied *sub nom. Apex Distrib Co.* v. *United States*, 368 U.S. 821. This is not to say that the proviso itself constitutes a prohibition but that the Congress realized that such conduct is prohibited by the earlier provisions of Section 281.

The meaning of the proviso relating to retired officers is shown by the history of Section 281. The second paragraph of Section 281 was added in 1940, in response to the decision in *Morgenthau* v. *Barrett*, 108 F. 2d 481 (C.A.D.C.) (1939), certiorari denied, 309 U.S. 672, which held that retired regular Army officers are officers employed by the United States within the meaning of the predecessor to Section 281 (18 U.S.C. 203 (1940 ed.)). As the result of this decision, all the provisions of the first paragraph of Section 281 would have fully applied to retired regular officers. By the 1940 amendment Congress intended to relieve retired officers "of the handicap of that court holding" which would "exclude business executives and accountants on a salary basis, as well as lawyers charging fees, from appearing before Departments, bureaus, commissions, and other agencies of the Government in behalf of business concerns, should they happen to be retired officers."[5] Congress, however, desired to retain the applicability of Section 281 in one particular: where retired officers might seek to participate in sales to the government *through the department in whose service they hold a retired status.* The

[5] 86 Cong. Rec. 12757.

second sentence of the 1940 amendment (presently the second sentence of the second paragraph of Section 281) effectuates that purpose. As stated by the House Committee on Military Affairs, which added this proviso to the 1940 Amendment (H. Rep. No. 2330, on H.R. 9024, 76th Cong., 3rd Sess., p. 1):

> The amendment adopted by the committee is intended to continue the prohibition against the sale of anything to a department by an officer formerly actively connected with that department. It applies only to representation in the actual sale of goods, and does not apply to employment and the other activities of any corporation or other person such as manufacturing.

2. Petitioner's second contention appears to be directed at the fact that the Defense Department's Directive interprets 18 U.S.C. 281 as applying to regular retired officers but not to reserve retired officers. (Pet. 14) The Department's interpretation, however, is compelled by two statutes which, in effect, exempt retired *reserve* officers from the provisions of Section 281.[6] The justification for this distinction between reserve and regular officers is manifest. Regular officers, because of their extensive active service, have

[6] 5 U.S.C. § 30r(c): "* * * Membership in a reserve component of the armed forces or in the National Guard does not prevent a person from practicing his civilian profession or occupation before, or in connection with, any department of the United States." 5 U.S.C. § 30r(d): "When he is not on active duty, or when he is on active duty for training, a Reserve is not considered to be an officer or employee of the United States or a person holding an office of trust or profit or discharging any official function under, or in connection with, the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

opportunities to become closely associated with those in their departments who are responsible for military procurement. Reserve officers, who in the main fulfill their active duty obligation through summer tours and weekly or monthly meetings, do not enjoy this opportunity. Accordingly, as the district court noted in ruling on petitioner's application for a three-judge court (J.A. 35), "[i]t is 'plainly insubstantial' to contend that this distinction is unconnected with a rational legislative purpose, is invidiously discriminatory, or violates the due process clause of the 5th Amendment in any other way."

3. Petitioner's third contention (Pet. 9) seems to be that the "Statement of Employment" required by the Department of Defense Directive of all regular retired officers (Pet. 5a, 7a-8a) compels petitioner to incriminate himself in violation of the Fifth Amendment. The required statement must be filed within thirty days of retirement and thereafter whenever the prior filed statement becomes inaccurate. The statement must include a description of the officer's employment and a statement that the officer's civilian duties "do not involve selling to the Government in violation of the statutes and policies cited in the regulation received [Directive No. 5500.7]" (Pet. 8a). Petitioner has already filed this Statement of Employment with respect to his present position as president of "Taussig Associates" (J.A. 25–26). As for the future, the complaint fails (even if we assume that equitable relief would be available in advance of an attempt to prosecute) because there is no allegation that there is any present or imminent probability that petitioner will be called upon to file a new statement.

4. Finally, petitioner's entire challenge to the Department of Defense Directive states no case or controversy appropriate for judicial resolution. Except for the obligation to file a Statement of Employment, which petitioner has already filed, the Directive places no obligations upon petitioner but is merely interpretive of the law with respect to selling activities by retired officers. Petitioner conceded in his complaint below that "no outstanding criminal actions against plaintiff are currently existing, or contemplated by defendants" (J.A. 3). Further, "no investigation, charge, trial by court-martial or other adverse action * * * is now pending in the Department of the Navy and none is contemplated." (Affidavit of Undersecretary of the Navy, Paul B. Fay, Jr., J.A. 19). In these circumstances petitioner is not entitled to an abstract adjudication regarding the scope of Section 281. *United Public Workers* v. *Mitchell,* 330 U.S. 75.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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